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Supreme Court, U.S.
FILED

05-286 AUG 31 2005

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2004

BENON JOHN TRAWINSKI,
IRENE MONAHAN TRAWINSKI,
PETITIONERS,

V.

UNITED TECHNOLOGIES CARRIER CORPORATION;
COMFORT SYSTEMS, U.S.A. (OWNER AND
PARENT CORPORATION OF STANDARD HEATING
AND AIR CONDITIONING CO.),
RESPONDENTS.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Did the Eleventh Circuit Court of Appeals depart exceedingly from the accepted and usual course of judicial proceedings and did this Court of Appeals sanction such departure by the lower Court?

LIST OF PARTIES IN THE PROCEEDING IN THE ELEVENTH CIRCUIT COURT

Comfort Systems, U.S.A. (hereinafter referred to as Comfort Systems); 777 Post Oak Boulevard, Houston, Texas 77056, owner and parent corporation for Standard Heating and Air Conditioning Co. (hereinafter referred to as Standard Co.).

Fox, Anthony N., Scott, Sullivan, Streetman & Fox, P.C., 2450 Valleydale Road, Birmingham, Alabama 35244; (205) 967-9675; attorney of record for Comfort Systems.

Sprain, Jr., Robert H., Sprain & Associates, P.C., 201 Beacon Parkway West, Suite 317, Birmingham, Alabama 35209; (205) 437-3232 attorney of record for United Technologies Carrier Corporation (hereinafter referred to as Carrier).

Trawinski, Benon John, pro se petitioner.

Trawinski, Irene Monahan, pro se petitioner.

United Technologies Carrier Corporation, One Carrier Place, Farmington, Connecticut 06034.

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OPINION BELOW

The United States [illegible]enth Circuit Court PER CURIAM of March 16, 2005 is repr[illegible]ed in the Appendix at pages 1-9. The PER CURIAM June 02, 2005 Order denying Petition for Rehearing en Banc is reproduced in the Appendix at page 10.

JURISDICTION

The judgment (App. 1-9) sought to be reviewed was entered March 16, 2005. The petition for a writ of certiorari is being filed within 90 days after denial of the Petition for Rehearing en banc (App. 10), pursuant to the United States Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ALABAMA LAW PERTINENT TO THIS CASE

Constitutional Provision.

The Alabama Constitution states "[t]hat all courts shall be open; and that every person, for any injury done him, in his lands, goods, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." Article I, § 13, Constitution of the State of Alabama, 1901, Volume 1, Michie's Alabama Code 1975, The Michie Company, Charlottesville, Virginia 1993. See also *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 999 (Ala. 1982).

Alabama Extended Manufacturer's Liability Doctrine (AEMLD):

The Products Liability Act § 6-5-500 et seq. was enacted "to provide a comprehensive time framework for the commencement and maintenance of all product liability actions brought in this state (Acts 1979, No. 79-468, p. 855, § 1)." It includes, among six products liability actions, those based upon "the Alabama extended manufacturer's liability doctrine, as it exists or is hereafter construed or modified." Civil Practice, Volume 5, Title

6, Michie's Alabama Code 1975, Article 28, § 6-5-501, p. 435. The principles of liability under AEMLD are the following.

> "To establish liability, a plaintiff must show:
> (1) he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold." *Civil Practice*, Article 28, p. 434.

ALA. CODE § 6-5-502(b).

> "Where the personal injury, including . . . property damage (I) either is latent or . . . not discoverable in the exercise of reasonable diligence at the time of its occurrence, and (ii) is the result of . . . exposure to some . . . harmful or injury producing . . . element . . . over a period of time . . . the product liability action claiming damages . . . must be commenced within one year from the date such personal injury or property damage is or in the exercise of reasonable diligence should have been discovered by the plaintiff or the plaintiff's decedent, and in such cases each of the elements of the product liability action shall be deemed to accrue at the time the personal injury is or in the exercise of reasonable diligence should have been discovered by the plaintiff or the plaintiff's decedent; . . ."

ALA. CODE § 6-5-502(c).

> "Notwithstanding the provisions of subsections (a) and (b) of this section, a product liability action against an original seller must be brought within 10 years after the manufactured product is first put to use by any person or business entity who did not acquire the manufactured product for either resale or other distribution or for

> incorporation as a component part in a manufactured product which is to be sold or otherwise distributed in its unused condition."

ALA, CODE § 6-2-38(l)

> "All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years."

STATEMENT OF THE CASE

This diversity action was commenced on June 24, 2003 when petitioners, who are residents of the State of Alabama, filed a complaint in the United States District Court of the Northern District of Alabama, Southern Division, entered as CV-03-RRA-1528-S, against Respondents Carrier and Comfort Systems. Petitioners averred in their pleadings (R1-1 and 2) liability under Alabama Extended Manufacturer's Liability Doctrine (AEMLD) against Carrier and Comfort Systems. Complaint (R1-1) and Amendment to Complaint (R1-2) were served with summons October 20, 2003.

Carrier filed 11/10/04 Motion to Dismiss (R1-6), and 12/1/03 Motion for Sanctions under Rule 11 (R1-8). An 11/19/03 Order (R1-7) was issued for petitioners/plaintiffs to respond to Carrier's Motion to Dismiss by December 15, 2003. This was followed by the 12/3/03 Order (App. 32) setting oral argument on Carrier's motions for January 12, 2004. At the January 12, 2004 Hearing, the Magistrate Judge requested Carrier's attorney to write a proposed memorandum opinion (R1-14 at 23, lines 21-23), and instructed him to file it in the Court (R1-14 at 26, lines 1-2) - an instruction Carrier did not comply with. At the same time the Court instructed plaintiffs to respond to Carrier's proposed memorandum opinion (R1-14 at 24).

On January 20, 2004 Comfort Systems belatedly appeared by filing a motion to dismiss (with attachment of a Complaint

unrelated to plaintiffs' AEMLD action) (R1-13) to which there was no Court Order issued for plaintiffs to respond. Prior to this and as a result of Comfort Systems' nonappearance after being served with Summons, petitioners' 11/28/03 Request for Entry of Default (R1-9), re Comfort Systems' failure to appear, was filed pursuant to F.R.C.P. 55(a); it received no response from the Magistrate Judge.

A motion by Carrier to supplement the record was granted by an Order (App. 30 docketed on March 8, 2004; a motion by plaintiffs for leave to amend their pleadings was denied by an Order (App. 31) docketed on March 10, 2004.

Carrier's proposed memorandum opinion, served but not filed with the United States District Court, was not a communication to plaintiffs, but a proposal requested by and addressed to the Court. In accordance with a Court directive at the 1/12/04 Hearing (R1-14 at 24) petitioners filed on March 12, 2004 their response (R1-22) to Carrier's proposed memorandum opinion; because Carrier's proposed memorandum opinion was not filed with the Court, plaintiffs attached it to their response.

On May 21, 2004 the Magistrate Judge issued an Order (App. 27-28) stating that "consideration of the defendants' motion to dismiss is complete" and enclosing forms of consent for continuing jurisdiction by the Magistrate Judge.

On June 7, 2004 a Memorandum Opinion (App. 14-26) and an Order (App. 13) dismissing the Complaint with prejudice was issued by Senior District Court Judge Robert B. Propst.

Plaintiffs' Notice of Appeal filed July 7, 2004 was changed (in ink), at the United States District Court level, indicating a switch in jurisdiction (App. 11-12) back to the Magistrate Judge; this change became known to plaintiffs upon the District Court's sending to the Clerk of the United States Eleventh Circuit Court of Appeals a checklist for transmission of documents.

The Eleventh Circuit Court affirmed the District Court's grant of summary judgment on limitations grounds (App. 9). The Eleventh Circuit Court judgment, which petitioners seek to have reviewed, was entered March 16, 2005. Petition to the Eleventh Circuit Court for Rehearing en banc was denied June 2, 2005. (App. 10).

REASONS FOR GRANTING THE WRIT

Petitioners rely on Rule 10(a) of the United States Supreme Court, which indicates the character of the reasons the Court considers for granting review: "a United States Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's supervisory power; . . ."

I. THE DECISION BY THE COURT BELOW TO SANCTION DENIAL OF NOTICE OF CONVERSION TO SUMMARY JUDGMENT AND THE UNFAIR AND PREJUDICIAL CONDUCT OF THE HEARING BY THE MAGISTRATE JUDGE IN THE LOWER COURT FROM WHICH THE BASIS FOR THE DENIAL ORIGINATED ARE IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

At the 1/12/04 Hearing on Carrier's motion to dismiss and motion for sanctions in the United States District Court, defense attorney Sprain spoke rapidly in a frequently inaudible voice and was permitted by the Magistrate Judge to dominate the Hearing. The microphones were not turned on, and even the Court Reporter had difficulty in hearing, as evidenced by her rendering of *Lankford* as *Ford* (R1-14 at 3, line 22) and as *Long* (R1-14 at 13, line 21). Numerous other places in the transcript indicate lack of adequate hearing by participants. Moreover the Magistrate Judge's cutting one of the plaintiffs off several times during her arguments encouraged attorney Sprain's abuses during the Hearing.

At the Hearing (R1-14 at 15, line 12) Carrier's defense attorney Sprain intentionally prejudiced the case to destroy

plaintiffs' AEMLD bases, prejudicially restricting applicability of the general Product Liability statute, ALA. CODE § 6-5-502(b), to toxic substances. Plaintiffs correctly asserted that this statutory provision is applicable to "the result of exposure to some injury producing element "(R1-14 at 14, lines 20-21). Injury is meant in the legal sense and element is not just chemical, and therefore, for example, "injury producing tremor in the middle house structure is an element producing property damage . . ." R1-22 at 4). Another example of attorney Sprain's abuses is his false statement of law[1] (R1-14 at 7, line 25) supported by the Magistrate Judge by asserting affirmatively in the form of a question that "Negligence is something that must be proven in a manufacturer's liability case" (R1-14 at 19, lines 21-22). This even led to Attorney Fox in Comfort Systems' Response Brief to the United States Eleventh Circuit Court of Appeals at p. 27 to attribute the following false quotation: "[n]egligence is the gravamen of a products liability action under Alabama law" to *Atkins v. American Motors Corp.*, 335 So.2d 134 (Ala. 1976), when what is stated in *Atkins* at 139 is just the opposite.

Attorney Sprain and the Magistrate Judge pressed the matter of negligence (R1-14 at 5, lines 23-25, at 7, line 25, and at 19, lines 21-22) in order to justify the application of the limitation statute ALA. CODE § 6-2-38(l) (R1-14 at 3, lines 8-10), for which there is no legal basis in a suit for damages like plaintiffs', reached by AEMLD; this was to deny petitioners any product liability discovery rule allowed by Alabama law.

After the Hearing the Magistrate Judge's granting attorney Sprain's Motion to Supplement the Record (App. 30) (see statement of the Case, p.4) with two documents

Plaintiffs' 1997 CV-97-6736 Complaint,
Affidavit by Attorney Sprain,

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[1]The correct statement of law is that "[n]egligence is not essential averment in statement of claim in products liability case, ..." *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala. 1976) at 134.

and denying plaintiffs' Motion to Amend (App. 31), gave further support to Carrier attorney's theory unsupported in Alabama law, false facts for plaintiffs' August 2002 discovery of damages, and pure appeal to prejudice while barring plaintiffs' crucial evidence[2] related directly to their August 2002 discovery. By his statements at the Hearing (R1-14 at 12, lines 17-18, and at 13, line 16) and his denial of plaintiffs' filed 3/5/04 Motion, the Magistrate Judge did not take seriously the degree of an unreasonably dangerous condition in plaintiffs' home that is reached by AEMLD.

Although the CV-97-6736 cas consisting of four counts, had a negligence count, it was definitely not a product liability action; it was a contract based action stemming from fraud and alleging poor performance of equipment. Alabama law makes clear distinction when product liability is based upon negligence and when product liability is based upon Alabama extended manufacturer's liability doctrine. In fact petitioners' pleadings

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[2]The Magistrate Judge was obviously influenced by Attorney Sprain and his referring to the large number of product liability cases he has handled, as compared with the pro se plaintiffs. The 3/10/04 entry of the denial of plaintiffs' filed 3/5/04 Motion for Leave to Amend essentially prevented plaintiffs from producing evidence in further support of plaintiffs' August 2002 discovery and Pleadings. By this action the Magistrate Judge denied a motion supported in its grounds by three cases in federal courts (*Bowden v. United States*, 176 F. 3d 552 (D.C. Cir. 1999); *Computer Assoc Intern. Inc. v. Computer Automation, Inc.*, 678 F. Supp. 424, 428", (S.D.N.Y. 1987); *Gilliham v. Shillinger*, 872 F.2d 935 (10th Cir. 1989) - a motion for an amendment that set forth obvious facts related to tremor and a heat related malfunction.

At the time (August 2002) of the first signs of an unreasonably dangerous condition, one of the signs was mold in the duct system (R1-1 at 13 and at 15 and R1-2 at 3) spilling from the duct onto the ceiling (Appellate Brief, p.7); this was in the dwelling where the bedrooms are. At the same time plaintiffs also noticed a slightly darkened area on the ceiling in the form of streaks emanating from one of the registers blowing air into their bedroom. When in May 2005 professionals had to replace the failed Carrier cooling coil, which released freon from the air conditioning system, they discovered ruptures (numerous twisted metal openings) in the gas burner component of the Carrier furnace, they had to terminate the use of the heating part by law because of the danger of carbon monoxide poisoning. Plaintiffs then realized that the darkened area on the ceiling, which by this time was much more pronounced, originally thought to be another manifestation of the mold, was actually due to malfunction of the Carrier heating system letting fumes into the air delivered to the bedrooms; plaintiffs had been subjected to these fumes.

(R1-1, R1-2) are more than sufficient regarding the Alabama Supreme Court assertion: "Under the Alabama extended manufacturer's liability doctrine, a manufacturer who markets a product not reasonably safe when put to its intended use in the usual and customary manner and causes injury to the user of the product is negligent as a matter of law." *Bailey v. Collier*, 465 So.2d, 381 (Ala. 1985). This is also stated in *Casrell v. Altec Industries, Inc.*, 335 So. 2d. 128 (Ala. 1976) at 128.

The CV-97-6736 Complaint[3] and Affidavit of Attorney Sprain filed by Attorney Sprain prejudicially misrepresenting prior lawsuits[4] had a one sided detrimental influence on the District Court Memorandum Opinion.

The way the matter was handled at the Hearing denied plaintiffs the opportunity they were entitled to, pursuant to F.R.C.P. Rule 56. The Magistrate Judge directed Attorney Sprain to draft, and file with the Court - which he did not do - a proposed

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[3]By Fraud upon the Court defendants procured on May 27, 1998 total dismissal of the case CV-97-6736; sensing what happened, plaintiffs dismissed their attorney of record before the breach of contract count was reinstated in July 1998 and became pro se. This attorney was later disbarred, and the trial judge who dealt with the CV-97-6736 case in 1998 was retired on disability by the Alabama Supreme Court.

[4]There were no tort claims in the CV-97-6736 case as Attorney Sprain attests; everything pertaining to the case originated from contract. After total dismissal in May 1998 the single count from the CV-97-6736 case was reinstated and scheduled for trial in December 2000, but by violating criminal laws with intent to disable the main pro se plaintiff so that the case could not go to trial, defense attorneys conducted their deposition of plaintiff in such an outrageous way that plaintiff had to seek medical help, had to go to a hospital emergency room and to be admitted to the hospital for tests. The ordeal at the deposition from which plaintiff never recovered led to debilitating permanent injuries and the filing of his Intentional Infliction of Emotional Distress (IIED) suit. Magistrate Judge Ott of the United States District Court in Birmingham threatened to dismiss the case, essentially barring plaintiff from United States procedural law; later he relied on illicitly filed with the United States District Court transcript, supported defendants' conduct because it was plaintiff who filed the suit against defendants, at the same time denying plaintiff's evidence, including medical and clinical records.

Magistrate Judge Ott's opinion, which was at odds with the opinion of an experienced Alabama lawyer who read the Complaint and the medical records and defendants' motions, led to the dismissal of the IIED case.

memorandum opinion (R1-14 at 23, lines 19-25 and at 24, lines 1-2), in which Attorney Sprain states that "[t]he Court hereby considers matters outside the pleadings and therefore the motion is converted into one for summary judgment." It was a miscarriage of justice for the Eleventh Circuit Court to sanction an obviously prejudicial and mere adversarial proposal, a pronouncement of conversion to summary judgment by the respondent/defendant, as a notice from the United States District Court.

The Per Curiam's claim of harmless error (App. 5) in not giving the strictly required notice of conversion to summary judgment is unfair and in conflict with the United States Supreme Court case *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 323 (1986) which sets forth the need for adequate notice and opportunity to present evidence. Petitioners had no notice and no opportunity to present evidentiary documents. In view of this, the case should have been decided on the 12(b)(6) level, in which case, dismissal of petitioners' cause of action would have been in conflict with this Court's decisions in *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974), *Hishon v. King and Spaulding*, 467 U.S. 69, 73 (1984), as well as *Conley v. Gibson*, 355 U.S. 41, 45-46 (1987). To all indications of this Court's holdings, petitioners' cause of action would withstand a challenge at this level.

Even at the summary judgment level, plaintiffs' claims are not due to be dismissed. This Court held in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999) that in reviewing the legal sufficiency of petitioner's cause of action [the Court] must assume the truth of the material facts alleged in the complaint." The averment of time of plaintiffs' discovery of an unreasonably dangerous condition is material, pursuant to F.R.C.P. Rule 9(f). In *Mitsushita Elec. Indust. Co. v, Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986) this Court states that "To survive [a movant's] motion for summary judgment [a nonmovant] must establish that there is a genuine issue of material fact . . . ." Petitioners have met this burden, but neither defendant satisfied the burden of showing the absence of a genuine issue of material fact as to the accrual date of the cause of action. *Adickes v. S.H. Kress & Co.*, 298 U.S. 144, 157 (1970). The August 2002 accrual

date would apply either to ALA. CODE § 6-2-38(l) or § 6-5-502(b).

II. PETITIONERS' RELIANCE ON AEMLD AND THE PRODUCT LIABILITY DISCOVERY RULE IS VALID.

Plaintiffs' reliance on one of the six product liability actions defined in ALA. CODE § 6-5-501(2) is valid. This is defined in § 6-5-501(2)(d) as a product liability action based upon "the Alabama extended manufacturer's liability doctrine, as it exists or is hereafter construed or modified."

After *Lankford v. Sullivan, Long, and Hagerty*, 416 So. 2d 996 (Ala. 1982), in numerous Alabama Supreme Court cases, the Alabama Extended Manufacturer's Liability Doctrine (see Petition, p.2) is restated. One example is the case *Koehring Cranes & Excavators, Inc. v. Livinston*, 597 So. 2d 1354 (Ala. 1992), where the Alabama Supreme Court restates at 1355 the requirements for actions under the AEMLD from the seminal case of *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128, 132-133; these requirements are so fundamental that they initiate ARTICLE 28, PRODUCT LIABILITY ACTIONS at p. 434 of *Civil Practice*.

That petitioners' cause of action is not time barred follows from *Lankford*, where the Supreme Court of Alabama declared the FIXED 10 year limitation provision in § 6-5-502(c) imposed for all product liability cases unconstitutional; this was to conform with the Alabama constitution (see Petition, p. 1) and to permit injuries occurring past the fixed 10 year period to be actionable. The intent of striking of the [fixed] ten year statute is not to deprive claims in product liability. In fact the court states in *Lankford* at 1004

> "It is . . . the judgment of this Court that Code 1975, § 6-5-502(c) is unconstitutional as violative of Article I, § 13, Constitution 1901. This decision should not be interpreted, however, as a holding that all limitations on the liability of manufacturers of products are prohibited by § 13.

On p. 1003 the court expresses its concerns about the arbitrariness of the statute.

> "The statute . . . would permit a purchaser of a defective product to sue for injuries received nine years and eleven months after the first use, whereas it would bar the action of a purchaser who was injured by the same defective product ten years and one month after he first used the product."

Petitioners' reliance in their Pleadings (R1-1 and 2) on the discovery rule ALA. CODE § 6-5-502(b) is justified as it is statutorily prescribed and is listed as applicable in product liability by the Supreme Court of Alabama. In the case *Travis v. Ziter*, 681 So. 2d 1348, 1354, 1355 (Ala. 1996), the Alabama Supreme Court stated that

> ". . . the Court will not apply the discovery rule unless it is specifically prescribed by the legislature."

and adds that

> "the discovery rule in Alabama is statutorily prescribed for certain actions, e.g. asbestos exposure actions § 6-2-30(b); fraud actions, § 6-2-3; medical liability actions, § 6-5-482(a); *product liability actions*, § 6-5-502(b); and legal services actions, § 6-5-574, Ala. Code 1975." emphasis added.

The Eleventh Circuit Court Per Curiam (App. 8) disregards the 1996 Alabama Supreme Court holding in *Travis* at 1354, 1355 and refers instead to a nonseverability[5] clause.

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[5]The nonseverability clause referred to in the Per Curiam (App. 8) was brought up by Attorney Fox in Comfort Systems' 9/15/04 Brief to the Eleventh Circuit Court, while Attorney Sprain for Carrier refrained from any such assertion, stating at the 1/12/04 Hearing that ". . . confusion perhaps might stem from the Alabama statute, a part of which was deemed unconstitutional, 6-5-502, and this is a glitch in Alabama law, . . . which I have not found a case that really explains it, but . . . one

Petitioners note that the Alabama Supreme Court uses the present tense for its holding in *Travis* (1996), just quoted, that lists the discovery rule ALA. CODE § 6-5-502(b) as part of the substantive law of Alabama, a case much more recent than *Lankford*. Thus the Alabama Supreme Court holding in *Travis* effectively supersedes the nonseverability clause, permitting ALA. CODE § 6-5-502(b) the discovery rule in product liability to stand unencumbered by the unconstitutionality of the fixed 10 year limitation for product liability which was in effect until *Lankford*. In fairness to everyone concerned with the application of the correct law, should the Eleventh Circuit Court not have submitted an appropriate certified question to the Alabama Supreme Court as it did in *Spain v. Brown & Williamson Tobacco Corp.*, 363 F. 3d 1183, 1188 (11th Cir.2004)? However the Alabama Supreme Court, by its stating in the 1982 *Lankford* case, p.1004 (petition, p.10) *what should not be the interpretation of its decision*, together with the Alabama Supreme Court holding in the 1996 *Travis* case (petition, p.11) gives credence to the conclusion that the discovery rule in product liability actions is statutorily prescribed.

In sanctioning the District Court's insupportable finding[6] that plaintiffs' state suit[7] brought in October 1997 (App. 2) was based on the same allegations as those in the present action, the Per Curiam (App. 7) refers to *Smith v. Medtronic, Inc.*, 607 So. 2d. 156,159 (Ala. 1992). The Eleventh Circuit Court ignored the fact that the Alabama Supreme Court finding in *Smith v. Medtronic* was based on separate and distinct defect (*Smith* at 157). The District Court in plaintiffs' case did not recognize the physical

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point is clear in Alabama law is that provision c has been deemed unconstitutional, . . . " (R1-14 at 3, lines 16-21).

[6]The Magistrate Judge barred all relevancy to this case by denying plaintiffs' Motion to Amend (App. 31), and any evidence before conversion to summary judgment (see argument Part I of this Petition).

[7]The suit was initiated in October 1997 by the CV-97-6736 Complaint whose copy is attached to the GRANTED Carrier Motion to Supplement Record (App. 30), objected to by plaintiffs and OVERRULED (App. 29); it is irrelevant to the product liability case and prejudicial (see argument in Part I of this Petition).

meaning of the first sign of unreasonably dangerous condition discovered in August 2002, the tremor damaging the middle structure of petitioners' home and the mold in the duct system spilling onto the ceiling - the contents of Footnote 2 of this Petition also bear relevance to their August 2002 discovery - which indicate, in the language of *Smith v. Medtronic*, a defect separate and distinct from the poor cooling performance of the equipment alleged in plaintiffs' October 1997 lawsuit.

CONCLUSION

Petitioners request that a writ of certiorari be issued. They also request, pursuant to 28 U.S.C. § 2106, that a resolution in their favor at this Court level be rendered, in view of the unfairness and prejudice they anticipate in the District Court.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-13454
Non-Argument Calendar

D.C. Docket No. 03-01528-CV-RRA-S

BENON JOHN TRAWINSKI,
IRENE MONAHAN TRAWINSKI,

Plaintiffs-Appellants,

versus

UNITED TECHNOLOGIES CARRIER CORPORATION,
(to whom is appended Weathertech Distributing Co., Inc.,
Carrier Corporation's appointed distributor responsible
in this legal action as seller with obligation to remedy
corporation's products),
COMFORT SYSTEMS, USA,
(owner and parent corporation of Standard Heating and
Air Conditioning Co.),

Defendants-Appellees,

Appeal from the United States District Court for the
Northern District of Alabama

(MARCH 16, 2005)

Before TJOFLAT, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

Benon John Trawinski and Irene Monahan Trawinski, proceeding pro se, appeal the district court's grant of summary judgment in their civil diversity action against United Technology Carrier Corporation ("Carrier") and Comfort Systems, USA ("Comfort Systems"). The district court granted summary judgment in favor of Carrier and Comfort Systems because the Trawinskis failed to file their case before the expiration of the applicable limitations period. We **AFFIRM.**

I. BACKGROUND

In 1993, the Trawinskis purchased a Carrier-made heating and air conditioning unit for their home from Standard Heating and Air, Inc. ("Standard"), a subsidiary of Comfort Systems. The installation of the unit was completed in 1994. Shortly thereafter, the Trawinskis began to experience problems with the unit. They alleged that the unit made excessive amounts of noise when it was running and that it did not adequately heat and cool their home. When these problems persisted, the Trawinskis informed Standard of their complaints. After several inspections, however, Standard employees represented to the Trawinskis that the unit was suitable for their home and was operating effectively.

Following several failed attempts to have the unit remediated or replaced by Standard, the Trawinskis filed suit in Alabama state court on 28 October 1997 against Standard, Carrier, and Weathertech Distributing Company, a Carrier subsidiary and distributor. They alleged negligence, breach of contract, breach of warranty, and fraud in the installation and inspection of their heating and air conditioning unit. The Trawinskis voluntarily dismissed this suit in November 2000, however, because Benon allegedly developed a health condition that limited his ability to proceed with the lawsuit. On 20 November 2001, the Trawinskis filed a lawsuit in federal court against Carrier and Standard and alleged that they had violated the Energy Policy and Conservation

Act, 42 U.S.C. § 6292 *et seq.*, and the civil conspiracy statute, 42 U.S.C. § 1985(3). The district court dismissed this suit because the statute of limitations had run on both of these claims and we affirmed. *See Trawinski v. United Techs.*, 313 F.3d 1295, 1299 (11th Cir. 2002) (per curiam). On 30 September 2002, Benon Trawinski filed in federal court a third lawsuit against Carrier and Comfort Systems and alleged intentional infliction of emotional distress based on harassment he received from defense counsel during a deposition for the initial 1997 lawsuit. The district court granted summary judgment in favor of Carrier and Comfort Systems and we affirmed. *See Trawinski v. United Techs. Carrier Corp.*, No. 04-10070 (11th Cir. July 7, 2004).

Finally, on 24 June 2003, the Trawinskis filed a fourth lawsuit which is the subject of this appeal. In their complaint, the Trawinskis alleged that Carrier and Comfort Systems were liable under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), *see* ALA. CODE § 6-5-501 (2)(d), for manufacturing and design defects in the heating and air conditioning unit that was installed in their house in 1994. They alleged that these defects resulted in excessive noise when the unit was running, prevented the unit from adequately heating and cooling their home, and caused damage to their health and their home. In response, Carrier and Comfort Systems filed motions to dismiss on the grounds that: (1) the complaint failed to state a claim upon which relief could be granted; (2) the cause of action under the AEMLD was time-barred; and (3) the suit was precluded under the doctrines of res judicata and collateral estoppel. After hearing oral argument on the motion to dismiss, the district court requested Carrier to submit a proposed memorandum order dismissing the case. Carrier submitted a proposed order which indicated that Carrier's motion would be "converted into one for summary judgment" because the district court would consider matters outside of the pleadings. See R1-22, Exh. A at 3. In addition to submitting the proposed order, Carrier also moved to supplement the record with, *inter alia*, the complaints filed by the Trawinskis in their previous lawsuits. On 4 March 2004, the Trawinskis filed their objections to the motions to dismiss. In this filing, the Trawinskis referenced Carrier's proposed order and

argued that "summary judgment is improper." *See* R1-22 at 12. In addition, their filing referenced the summary judgment standard by arguing that there were "genuine issues of material fact that should be decided at trial." *Id.* (internal quotations and citations omitted).

On 7 June 2004, the district court granted summary judgment in favor of Carrier and Comfort Systems because it found that the Trawinskis' suit was filed after the two-year limitations period for their AEMLD claim had expired. In making this ruling, the district court treated the motions to dismiss as motions for summary judgment because, after granting Carrier's motion to supplement, it had considered evidence not contained in the pleadings. On appeal, the Trawinskis argue that summary judgment was improperly granted because: (1) they did not receive proper notice that the motions to dismiss were being converted into motions for summary judgment; and (2) their claim is not time-barred pursuant to the "discovery rule," codified at ALA. CODE § 6-5-502(b), which applies to their present cause of action.

II. DISCUSSION

A. Conversion of 12(b)(6) Motion to Dismiss

The Federal Rules of Civil Procedure provide that a defendant may move to dismiss a case when the plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). If, however, when a defendant makes a 12(b)(6) motion, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). When a motion to dismiss is thus converted into a motion for summary judgment, the "district court is required to notify the parties that the motion has been converted, and give the parties 10 days in which to supplement the record." *Trustmark Ins. Co. v. ESLU. Inc.*, 299 F.3d 1265, 1267 (11th Cir. 2002). A district court's failure to strictly adhere to this ten-day notice requirement

constitutes reversible error. *See Donaldson v. Clark*, 819 F.2d 1551, 1555 (11th Cir. 1987) (en banc) (reversing grant of summary judgment because district court gave the nonmoving party seven days to supplement the record instead of the requisite ten days).

We have recognized exceptions to the notice requirement, however, in certain "unique" circumstances when the district court's error may be deemed harmless. *See Property Mgmt. & Invs.,. Inc. v. Lewis*, 752 F.2d 599, 605 (11th Cir. 1985). Specifically, we have found harmless error when the nonmoving party demonstrates through its actions that it was "aware that the judge was converting th[e] 12(b)(6) motion" into a summary judgment motion. *Id.* For example, we have found that, when a party referenced the summary judgment standard in a filing that was responsive to a 12(b)(6) motion, the district court's failure to afford the parties proper notice of conversion was harmless error. *See Trustmark Ins. Co.*, 299 F.3d at 1268-69 (finding harmless error because the nonmoving party referenced outstanding "legal and factual issues" in its motion to extend time to respond to a 12(b)(6) motion); *Denis v. Liberty Mut. Ins. Co.*, 791 F.2d 846,850 (11th Cir. 1986) (finding harmless error where the nonmoving party's responsive filing to a 12(b)(6) motion "specifically stated that it raised a genuine issue of material fact and that [the defendant] was not entitled to judgment as a matter of law"). Moreover, where a nonmoving party "made all the arguments and submitted all the documents that they would have presented had they received the notice to which they were entitled," we have found that the district court's failure to give proper notice was harmless error. *Property Mgmt. & Invs., Inc.*, 752 F.2d at 605; *accord Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213 (11th Cir. 1995).

In this case, the district court erred by failing to provide the Trawinskis with proper notice of conversion. *See Griffith v. Wainwright*, 772 F.2d 822, 824 (11th Cir. 1985) (per curiam) (finding that district court must give parties "express notice" of conversion). This error, however, was harmless because the Trawinskis demonstrated that they were aware of the conversion

and presented all available arguments. In their motion in response to Carrier's proposed order, they argued that summary judgment was improper and referenced the summary judgment standard. These references indicate that the Trawinskis were sufficiently aware that the district court was treating the motions to dismiss as motions for summary judgment. *See Denis*, 791 F.2d at 850. Moreover, as we explain below, the vitality of the Trawinskis' claim hinges on their argument that the "discovery rule" brings their present claim within the applicable statute of limitations. Because the district court considered this argument in disposing of the case on summary judgment, all relevant arguments in opposition to the grant of summary judgment that the Trawiskis would have asserted had they been given the proper notice were in fact before the district court. *See Property Mgmt. & Invs., Inc.*, 752 F.2d at 605. In sum, although the Trawinskis were not given the requisite notice, they had an opportunity to respond to Carrier's proposed order and they did so. Thus, while the district court should have been "particularly careful to ensure proper notice" was given to the Trawinskis as pro se litigants, *Herron v. Beck*, 693 F.2d 125, 127 (11 th Cir. 1982), we find that, consistent with *Denis* and *Property Management*, the district court's error was harmless.

B. Grant of Summary Judgment

"We review a district court's application of a statute of limitations and its grant of summary judgment *de novo*." *McCaleb v. A.O. Smith Corp.*, 200 F.3d 747, 750 (11th Cir. 2000). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing a grant of summary judgment, we view all evidence and factual inferences reasonably drawn therefrom in the light most favorable to the nonmoving party. *See Burton v. Tampa Hous. Auth.*, 271 F.3d 1274, 1277 (11th Cir. 2001). Summary judgment is appropriate when an action is barred by the applicable statute of

limitations. *See Powers v. Graff*, 148 F.3d 1223, 1224 (11th Cir. 1998).

In an action based on diversity jurisdiction, the federal court must apply the substantive law of the forum state. *See Davis v. National Med. Enters.*, 253 F.3d 1314, 1319 n.6 (11th Cir. 2001). "[S]tate statutes of limitations are substantive laws and must be followed by federal courts in diversity actions." *See Cambridge Mut. Fire Ins. Co. v. City of Claxton. Ga.*, 720 F.2d 1230, 1232 (11th Cir. 1983) (*citing Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S. Ct. 1464 (1945)). Accordingly, because the Trawanskis' action was filed in federal court in Alabama, the district court properly applied Alabama law. *See Saxton v. ACF Indus.*, 254 F.3d 959,961-62 (11th Cir. 2001) (en banc).

According to Alabama law, "[a]ll actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years." ALA. CODE § 6-2-38(*l*). The Alabama Supreme Court has specifically applied this catch-all two-year limitations period to actions brought under the AEMLD. *See Smith v. Medtronic. Inc.*, 607 So. 2d 156, 159 (Ala. 1992) ("An action alleging negligence, wantonness, or liability under the [AEMLD] must be brought within two years after the cause of action accrued."); *accord Mobile Infirmary v. Delchamps*, 642 So. 2d 954, 957 n.2 (Ala. 1994). A cause of action "accrues" as soon as the legally injured party may bring suit based on the injury. *Smith*, 607 So.2d at 159. The statute of limitations thus begins to run at "the time of the first legal injury . . . whether or not the full amount of damages is apparent." *Id.*

Based on the foregoing, we find that the district court properly applied the two-year statute of limitations to the Trawinskis' products liability claim brought under the AEMLD. Moreover, we agree with the district court that, because the Trawinskis were able to bring suit in state court in October 1997 based on the same alleged malfunctions in the heating and air conditioning unit that is the subject of this case, their present cause of action at the latest began to accrue on the date they filed the 1997 lawsuit. *See id.*

The statute of limitations began to run in October 1997 even if, as the Trawinskis claim, the damages for which they are currently seeking compensation became apparent at some time subsequent to the initial suit. *See id.* Accordingly, because the Trawaskis filed the complaint in this case after the two-year limitations period expired, it was untimely.

In making this determination, we reject the Trawinskis' argument that the "discovery rule," codified at ALA. CODE § 6-5-502(b),[1] applied to this case and brought their present claim within the statute of limitations. In *Lankford v. Sullivan, Long, and Hagerty*, the Alabama Supreme Court declared ALA. CODE § 6-5-502(c) unconstitutional. *See* 416 So. 2d 996, 1004 (Ala. 1982). This provision was part of a larger section of Alabama law to which a nonseverablility clause applied. See ALA. CODE § 6-5-504 ("It is expressly provided that each section, clause, provision, or portion of this division shall be construed as inseparable and nonseverable from all others. . . ."). The nonseverability provision provided that "in the event that any . . . portion of this division shall be held invalid or unconstitutional by any court of competent jurisdiction, the entire division and each section, clause, provision, or portion thereof shall be inoperative and have no effect." Id. Thus, by virtue of this nonseverability clause and the decision in *Lankford*, § 6-5-502(b) was rendered void and therefore inapplicable to the Trawinskis' AEMLD claim; rather, the two-year catch-all statute of limitations defined in ALA. CODE § 6-2-38*(1)* applied. *See Ridling v. Armstrong World Indus., Inc.*, 627 F. Supp. 1057, 1061 (S.D. Ala. 1986) (finding that the two-year statute of limitations in § 6-2-38*(1)* applied to an asbestos injury claim by default because *Lankford* rendered the statute of limitations provisions in § 6-5-502 void). Accordingly, because

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[1] The "discovery rule" provides that, in a product liability action:

> [w]here the personal injury. . . (i) either is latent or by its nature is not discoverable in the exercise of reasonable diligence at the time of its occurrence, and (ii) is the result of ingestion of or exposure to some toxic or harmful or injury-producing substance, . . . [such action] must be commenced within one year from the date such personal injury or property damage is or in the exercise of reasonable diligence should have been discovered by the plaintiff. . . . ALA. CODE § 6-5-502(b).

the Trawinskis filed suit after the expiration of the applicable limitations period, the district court properly granted summary judgment in favor of Carrier and Comfort Systems. *See Pacific Harbor Capital, Inc. v. Barnett Bank N.A.*, 252 F.3d 1246, 1252 (11th Cir. 2001) (affirming grant of summary judgment because limitations period had expired before the complaint was filed).

III. CONCLUSION

On appeal, the Trawinskis argued that the district court improperly granted summary judgment on their AEMLD claim because it failed to provide notice it was converting Carrier's and Comfort System's motions to dismiss into motions for summary judgment and because it declined to apply the "discovery rule" to determine whether the suit was timely filed. As we have explained, however, the district court's failure to afford the Trawinskis proper notice was harmless error and Alabama's "discovery rule" in products liability actions was rendered inoperative. Accordingly, because the Trawinskis' suit was filed after the applicable two-year limitations period had expired, the district court's grant of summary judgment is **AFFIRMED.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-13454

BENON JOHN TRAWINSKI,
IRENE MONAHAN TRAWINSKI,

Plaintiffs-Appellants,

versus

UNITED TECHNOLOGIES CARRIER CORPORATION, to whom is appended Weathertech Distributing Co., Inc., Carrier Corporation's appointed distributor responsible in this legal action as seller with obligation to remedy corporation's products)
COMFORT SYSTEMS, USA,
(owner and parent corporation of Standard Heating and Air Conditioning Co.),

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

Before: TJOFLAT, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:
The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled *on* rehearing *en* banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.
ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

A-11

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OF A DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

FILE NUMBER CV-03-PT-1528-S

BENON JOHN TRAWINSKI AND IRENE MONAHAN TRAWINSKI,	)	
Plaintiffs,	)	
vs.	)	**Notice of Appeal**
UNITED TECHNOLOGIES CARRIER CORPORATION (TO WHOM IS APPENDED WEATHERTECH DISTRIBUTING CO., INC. CARRIER CORPORATION'S APPOINTED DISTRIBUTOR RESPONSIBLE IN THIS LEGAL ACTION AS SELLER WITH OBLIGATION TO REMEDY CORPORATION'S PRODUCTS) AND COMFORT SYSTEMS, U.S.A. (OWNER AND PARENT CORPORATION OF STANDARD HEATING AND AIR CONDITIONING CO.),	)	
Defendants.	)	

In accordance with FRAP, Rule 3 and Rule 4(a)(1)(A), notice is hereby given that Benon John Trawinski and Irene Monahan

Trawinski, plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the final judgment entered in this action on the seventh day of June, 2004.

/s/ Benon Trawinski
Benon Trawinski, PRO SE

/s/ Irene Trawinski
Irene Trawinski, PRO SE

Address:
3440 Westbury Road
Birmingham, Al. 35223
(205) 967-4406

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI and IRENE MONAHAN TRAWINSKI,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 03-PT-1528-S**
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS, U.S.A (Owner and Parent Corporation of Standard Heating and Air Conditioning Co.),	)	
Defendants.	)	

ORDER

In accord with the Memorandum Opinion entered contemporaneously herewith, the defendants' motions for summary judgment are GRANTED, and the complaint is hereby DISMISSED with PREJUDICE. Costs are taxed to the plaintiff.

DONE this 7th day of June, 2004.

/s/ Robert B. Propst
Robert B. Propst
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI and IRENE MONAHAN TRAWINSKI,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 03-PT-1528-S**
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS, U.S.A. (Owner and Parent Corporation of Standard Heating and Air Conditioning Co.),	)	
Defendants.	)	

MEMORANDUM OPINION

This case is before the court on the motions to dismiss filed by defendants United Technologies Carrier Corporation ("Carrier") and Comfort Systems, USA ("Comfort"). For the reasons set out herein, the defendants' motions to dismiss are converted into motions for summary judgment, and as such, they are due to be granted and the plaintiffs' claims against the defendants are due to be dismissed with prejudice.

BACKGROUND

The plaintiffs, who are proceeding *pro se,* filed their complaint against the defendants on June 24, 2003, alleging a cause of action under the Alabama Extended Manufacturer's Liability Doctrine.

The plaintiffs filed an amendment to their complaint on October 17, 2003, correcting several typographical errors and adding new averments. The plaintiffs have filed suit against these defendants on four previous occasions.[1]

The plaintiffs first sued these defendants in the Circuit Court of Jefferson County, Alabama, in a complaint filed on October 28, 1997, alleging state law claims of fraud and breach of contract, based on alleged defects in Carrier's heating and air conditioning system. *Trawinski v. Standard Heating & Air Conditioning Co.*, CV-97-06736-WJW. Apparently, summary judgment was entered against the plaintiffs in that case, then later set aside and the case reinstated. On November 21, 2000, the plaintiffs voluntarily dismissed their claims without prejudice.[2]

On May 29, 2001, the plaintiffs filed a complaint in this court "ask[ing] this Honorable Court to commence an independent action, in accordance with FRCP 60(b)(6) and Rule 60(b)(6) ARCP, based on the Amended Complaint of October 1997," which was the state court proceeding. *Trawinski v. Standard Heating & Air Conditioning Co.*, CV-01-N1373-S. In that action, the plaintiffs sought "reinstatement of all four counts against all three defendants [who] were dismissed by the May 27, 1998

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[1] An additional defendant, Weathertech Distributing Co., Inc., was named in several of the other actions, but is not a defendant in this action. Mrs. Trawinski was not a plaintiff in the most recent action filed in this court before this action, *Trawinski v. United Technologies Carrier Corporation, et al.*, CV-02-B-2396-S.

[2] The plaintiffs maintain that they were left no choice but to voluntarily dismiss the state action in 2000, because Mr. Trawinski "suffered a medically diagnosed injury as a result of severe emotionally distressing 9/29/00 and 10/3/00 deposition[s] and became increasingly ill in the weeks following." Plaintiffs' Complaint, p. 7.

Summary Judgment Order." The court issued a show cause order indicating that it lacked subject matter jurisdiction because the defendants were not state actors and the federal district court has no jurisdiction to review state court decisions. In response to the show cause order, the plaintiffs attempted to raise claims under the Energy Policy and Conservation Act ("EPCA "). After considering the plaintiffs' response, the court dismissed the claims on July 3, 2001, on the grounds that it lacked subject matter jurisdiction.

On November 20, 2001, the plaintiffs filed a second action in this court alleging violations of the EPCA and an unlawful conspiracy in violation of 42 U.S.C. § 1985(3). *Trawinski v. United Technologies, et al.*, CV 01-BU-2954-S. The court dismissed the plaintiffs' claims on May 9, 2002, because they were time-barred and for lack of subject matter jurisdiction. On December 3, 2002, the Eleventh Circuit Court of Appeals affirmed the dismissal of the plaintiffs' claims.[3] *Trawinski v. United Technologies*, 313 F.3d 1295 (11th Cir. 2002).

On September 30, 2002, Mr. Trawinski filed another action in this court. *Trawinski v. United Technologies, et al.*, CV-02-B-2396-S. The allegations of that complaint arose out of a series of depositions taken by counsel for Carrier and Standard during the discovery phase of the original state court action. On November 28, 2003, the court granted the defendants' motions for summary judgment and dismissed the action. However, the appeal is still pending before the Eleventh Circuit Court of Appeals.

In the current action, the plaintiffs complain about a heating

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[3]The Eleventh Circuit noted that although the S 1985(3) claim was properly dismissed by the District Court, it was dismissed for failure to state a claim rather than want of subject matter jurisdiction. *Trawinski*, 313 F.3d at 1299.

and air conditioning system, manufactured by Carrier and installed in their home from June 23, 1993 through May 6, 1994, by Standard Heating and Air Conditioning Company, which is owned by defendant Comfort Systems, U.S.A. The plaintiffs complain that the noise is excessive, that the cooling, including dehumidification, is improper, that the furnace is oversized, that in addition to creating noise and disturbance, "the oversized blower that accompanies the mismatched equipment is a source of energy loaded noise . . . is a source of damage to person and property," and that Standard provided them with "poor workmanship" when its employees were sent to start the furnace, but failed to do so, and ended up "knocking out the whole system (including the air conditioning) and leaving the premises without even telling" them. Plaintiffs' Complaint, pp. 5 - 6, 12. The plaintiffs allege that the system is defective in its "failure to reach design specifications for PROPER COOLING CAPACITY which depends on the ability of the condensing unit-cooling coil-process to extract heat and moisture from the conditioned air moving through the cooling coil, when the outdoor temperature is 95° F (a federal requirement); the defect manifests itself at outdoor temperatures well below 95° F." Plaintiffs' Complaint, pp. 12 - 13. Additionally they claim that:

> The product installed in the Trawinski's home had manufacturing and/or design defects manifested by improper cooling and dehumidification that sustains in the air conditioned dwelling unreasonably high humidity which eventually caused mold in the duct system.
>
> Plaintiffs aver that while by installing at the point of use the oversized furnace containing a much larger than prescribed blower producing excessive DFM - in order to cover up the manufacturing and/or design defect of the 38TRO42 model condensing unit's air conditioning performance, defendants produced in the existing

properly designed duct system (for 31/2 ton heating and air conditioning) an energy loaded air turbulence that together with the mechanical noise of the oversized furnace - a sleep disturbing noise - induces into the middle house structure a continuing disturbance, slowly but surely damaging the home; an example of the damage is the damage to the staircase right below the ceiling over which the oversized furnace is installed in the attic.

The Trawinskis are subjected to injurious continuing energy loaded sleep disturbing, health affecting noise generated by the defectively operating Carrier equipment.

Plaintiffs paid Standard Co. through Alagasco the contractual amount of $6786, in a timely manner (shortly after the June installation, at a time chosen by Standard Co.) for installation of the heating and air conditioning system; plaintiffs have endured enormous costs since the time of contracting and installation. As part of the costs plaintiffs have suffered continuing injury in the form of monetary loss, and recently discovered that they have paid and will pay - if the equipment remains in place - excessive costs for the defective equipment's continued operation.

Plaintiffs' Complaint, pp. 13 - 14. Regarding damages, the plaintiff allege that:

Plaintiffs have suffered an unhealthy indoor environment: after years of improper cooling and dehumidification during the cooling season, mold has set in the air delivery duct system. The mold has affected,

and will continue to affect plaintiffs' health, and it is more than probable than otherwise that damage to property and health will increase in the future if the source of the damage is not remedied. Plaintiffs request past, present, and future damages for injury to health and property; property damage is compensation for replacement of air delivery ducts affected by mold.

Because of seller's selection of the installed Carrier equipment, including installation of an oversized furnace, plaintiffs have been paying excessive energy costs for operation of the oversized furnace; plaintiffs will continue to pay these excessive energy costs if the installed equipment is not replaced. This amounts to plaintiffs having to pay for the destruction of their health and diminution of the value of their property. Plaintiffs request past, present, and future damages for these injuries and this damage. Excessive energy costs include: excessive gas for furnace operation and excessive electricity for operating the motor of the oversized blower (all seasons); electricity for running the entire air conditioning system when improperly operating compressor is engaged without any effect on cooling.

The sleep disorder (first intermittently alleviated by medication, later and at present alleviated by nightly use of medication) was induced gradually by years of exposure to the operation of the oversized furnace blower generating disturbing energy loaded air turbulence noise, and additionally in the winter, noise from the very much oversized jet-sounding furnace

burners. Plaintiffs request compensation for this health injurious damage.

> The damage resulting from the energy loaded turbulence which induces continuing disturbance into the middle structure of the home - whenever the oversized furnace blower is running, and more so when cooling, as it produces more CFM's and hence more intense turbulence - is particularly discernible in the deterioration of the elliptical staircase (which will get much worse with time) in a two story foyer directly below the ceiling over which the oversized furnace is installed; this staircase is a marvel of design and craftsmanship and its replacement will be costly. Plaintiffs request damages for this expense.
>
> Plaintiffs request past, present, and future damages for mental pain and suffering. Future damages are requested because future pain and suffering is more probable than otherwise.
>
> Because this is a tort action and defendants capriciously and deliberately engaged in oppression and wantonness, plaintiffs request punitive damages. Pursuant to Alabama Code 22 6-11-20, the punitive damages requested exceed $250,000 because they are based on a pattern of intentional wrongful conduct.

Plaintiff's Complaint, pp. 16 - 17. The plaintiffs seek damages in the amount of $2,525,250.00.

On November 10, 2003, Carrier filed a motion to dismiss, accompanied by Exhibit A, which is a summary of the prior lawsuits brought by the plaintiffs against the defendants. The

plaintiffs filed an objection to Carrier's motion to dismiss on December 15, 2003. On January 12, 2004, oral argument was heard on Carrier's motion to dismiss. At the conclusion of oral argument, the court requested Carrier to draft a proposed memorandum opinion setting out the positions of both Carrier and the plaintiffs, along with Carrier's argument that the case is due to be dismissed. Carrier has provided the court with the requested proposed memorandum opinion. On January 20, 2004, Comfort filed a motion to dismiss, accompanied by a copy of the complaint in *Trawinski v. United Technologies*, CV-02-B-2396-S. On February 12, 2004, Carrier filed a motion to supplement the record with a copy of the affidavit of Carrier's attorney, Robert H. Sprain, Jr., that was previously filed in *Trawinski v. United Technologies*, CV-02-B-2396-S, and a copy of the complaint filed by the Trawinskis in their state action, *Trawinski v. Standard Heating & Air Conditioning Co.*, CV-97-06736 WJW. On February 27, 2004, the plaintiffs filed an objection to Carrier's motion to supplement the record. On March 1, 2004, the court overruled the plaintiffs' objections and on March 8, 2004, the court granted Carrier's motion to supplement the record. The plaintiffs filed a response to Carrier's proposed memorandum opinion on March 12, 2004.

Because copies of the plaintiffs' complaints in previous actions and Attorney Sprain's affidavit have been presented in support of these motions, the court will treat the motions to dismiss as motions for summary judgment.

MOTIONS TO DISMISS

In their motions to dismiss, the defendants argue that the case is due to be dismissed with prejudice because it is barred by the two-year statute of limitations set forth in Alabama Code § 6-2-

38(1), and because it is barred by the doctrines of res judicata and collateral estoppel. The plaintiffs respond that:

> The material facts relevant to statute of limitations in plaintiffs' case are: when injuries were discovered in relation to the time when the product was first put to use; both times are within the bounds of limitation periods. The product was first put to use on June 25, 1993 (see ¶ (11), Complaint) or alternatively, when the seller, acting on its own, completed documents and received full payment for the product in July 1993, and the suit CV-03-RRA-1528-S was filed June 24, 2003, within the 10 year period prescribed by Alabama Code § 6-5-502(c); plaintiffs injuries became discoverable and were discovered well within the one year period prior to bringing the AEMLD action (see ¶ (36), Amendment to Complaint). Thus the action was timely filed within the one year period prescribed by Alabama Code § 6-5-502(b).

Plaintiff's Objection to Defendant Carrier Corporation's Motion to Dismiss, pp. 1 - 2.

SUMMARY JUDGMENT STANDARD

Summary judgment is to be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the declarations, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. Civ. P. 56(c); *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The party asking for summary judgment "bears the initial burden to show the district court, by reference to

materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the nonmoving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144,157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970).

The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of her case on which she bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322-23; *see* FED. R. Civ. P. 56(a) and (b). Once the moving party has met her burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. The nonmoving party need not present evidence in a form necessary for admission at trial; however, the movant may not merely rest on the pleadings. *(Id.)*.

After a motion has been responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c). The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

The plaintiffs' arguments are without merit. The two-year statute of limitations set forth in *Ala. Code* § 6-2-38(l) (1975) applies to actions alleging liability under the AEMLD. *See Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1188 (11th Cir. 2004); *Mobile Infirmary v. Delchamps*, 642 So.2d 954, 957 n. 2 (Ala. 1994); *Smith v. Medtronic, Inc.*, 607 So.2d 156, 159 (Ala. 1992); *CertainTeed Corp. v. Russell*, No. 2010877, 2003 WL 21488751 at *3 (Ala. Civ. App. June 27, 2003); *Mueller Co. v. Trambeam Corp.*, 693 So.2d 1380, 1382 (Ala. Civ. App. 1997).

> The statute of limitations on a claim begins to run when the cause of action accrues. *Home Ins. Co. v. Stuart-McCorkle, Inc.*, 291 Ala. 601, 285 So.2d 468 (1973). A cause of action accrues as soon as the claimant is entitled to maintain an action, regardless of whether the full amount of the damage is apparent at the time of the first legal injury. *Smith v. Medtronic, Inc., supra; Garrett v. Raytheon Co.*, 368 So.2d 516, 518-19 (Ala.1979). In *Kelly v. Shropshire*, 199 Ala. 602, 604-05, 75 So. 291, 292 (1917), the rule was stated as follows:
>
> > If the act of which the injury is the natural sequence is of itself a legal injury to plaintiff, a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, be the actual damage [then apparent] however slight, and *the statute will operate to bar a recovery not only for the present damages but for damages developing subsequently and not actionable at the time of the wrong done; for in such a case the subsequent increase in the damages*

> *resulting gives no new cause of action.* Nor does plaintiff's ignorance of the tort or injury, at least if there is no fraudulent concealment by defendant, postpone the running of the statute until the tort or injury is discovered. (Emphasis added.)

Chandiwala v. Pate Canst. Co., No. 1021940, 2004 WL596098 at *3 (Ala. March 26, 2004).

The plaintiffs first filed a lawsuit complaining about their allegedly defective heating and air conditioning system on October 28,1997. Clearly, at that point the plaintiffs believed they had suffered a legal injury as a result of their allegedly faulty heating and air conditioning system. Thus, the two-year limitations period began to run no later than October 28, 1997, when their first lawsuit was filed, and expired no later than 1999. The fact that the allegedly defective system continued to perform inefficiently and/or improperly until it produced the damage about which the Trawinskis now complain did not postpone the running of the statute until the date the plaintiffs allege that they discovered the new damage in late August, 2002. *See Chandiwala, Id.* Because the Trawinskis neglected to make the necessary repairs or changes to their system at the time they originally discovered the alleged defects, they cannot now attempt to recover for the subsequent damage to their house.

Because the plaintiffs' claims are barred by the two-year statute of limitations, the discussion of res judicata and collateral estoppel is pretermitted.

CONCLUSION

The defendants' motions to dismiss, which the court has converted into motions for summary judgment, are due to be GRANTED. An appropriate order will be entered.

DONE this 7th day of June, 2004.

/s/ Robert B. Propst
Robert B. Propst
Senior United States District Judge

Entered 3/02/04

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI and IRENE MONAHAN TRAWINSKI,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION**
vs.	)	**NO.**
	)	**03-RRA-1528-S**
	)	
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS, USA (owner and parent) corporation of Standard Heating and Air Conditioning),	)	
	)	
	)	
Defendants.	)	

ORDER

Consideration of the defendants' motion to dismiss is complete. If the parties desire to consent to magistrate judge jurisdiction for all purposes, including determination of any dispositive motions, trial, and final judgment, under 28 § 636(c), the attached form should be signed and mailed to the clerk within seven (7) days. *If a party does not wish to consent, he should simply do nothing.* The clerk will report the parties' responses to the undersigned only if the report is that all parties have consented; if there is not unanimous consent, the clerk will not inform the undersigned as to whether a party did or did not consent.

DONE this 21st day of May, 2004.

/s/ Robert R. Armstrong
Robert R. Armstrong, Jr.
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI AND IRENE MONAHAN TRAWINSKI,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 03-RRA-1528-S**
UNITED TECHNOLOGIES CARRIER CORPORATION (TO WHOM IS APPENDED WEATHERTECH DISTRIBUTING CO., INC., CARRIER CORPORATION'S APPOINTED DISTRIBUTOR RESPONSIBLE IN THIS LEGAL ACTION AS SELLER WITH OBLIGATION TO REMEDY CORPORATION'S PRODUCTS) AND COMFORT SYSTEMS, U.S.A. (OWNER AND PARENT CORPORATION OF STANDARD HEATING AND AIR CONDITIONING CO.),	)	
Defendants.	)	

OBJECTION TO PREJUDICIAL SUPPLEMENT

OVERRULED

/s/ RRA
Robert R. Armstrong, Jr.
United States Magistrate Judge

Entered 3/2/04

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI and IRENE MONAHAN TRAWINSKI,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 03-RRA-1528-S**
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS, USA (owner and parent corporation of Standard Heating and Air Conditioning),	)	
Defendants.	)	

MOTION TO SUPPLEMENT RECORD

GRANTED

/s/ RRA
Robert R. Armstrong
United States Magistrate Judge

Entered 3/10/04

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI AND IRENE MONAHAN TRAWINSKI,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 03-RRA-1528-S**
UNITED TECHNOLOGIES CARRIER CORPORATION (TO WHOM IS APPENDED WEATHERTECH DISTRIBUTING CO., INC., CARRIER CORPORATION'S APPOINTED DISTRIBUTOR RESPONSIBLE IN THIS LEGAL ACTION AS SELLER WITH OBLIGATION TO REMEDY CORPORATION'S PRODUCTS) AND COMFORT SYSTEMS, U.S.A. (OWNER AND PARENT CORPORATION OF STANDARD HEATING AND AIR CONDITIONING CO.),	)	
Defendants.	)	

MOTION FOR LEAVE
TO AMEND PLEADINGS

DENIED

/s/ RRA
Robert R. Armstrong, Jr.
United States Magistrate Judge

Entered 3/10/04

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI and IRENE MONAHAN TRAWINSKI,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 03-RRA-1528-S**
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS, U.S.A (Owner and Parent Corporation of Standard Heating and Air Conditioning Co.),	)	
Defendaats.	)	

ORDER

The "Motion to Dismiss" and the "Motion for Sanctions Under Rule 11" are hereby set for oral argument on January 12, 2004, at 2:00 p.m., Hugo L. Black United States Federal Courthouse, Courtroom 2B.

DONE this 3rd day of December, 2003.

/s/ Robert R. Armstrong, Jr.
Robert R. Armstrong, Jr.
United States Magistrate Judge